UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

PRIDDIS MUSIC, INC.,

Plaintiff,

- against -

05-CV-0491
DNH/DRH

TRANS WORLD ENTERTAINMENT CORPORATION,

Defendant.

DEFENDANT/ COUNTER-CLAIM PLAINTIFF TRANS WORLD ENTERTAINMENT CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant and Counter-Claim Plaintiff Trans World Entertainment Corp. ("TWEC") respectfully submits this Memorandum of Law in Support of its Motion for Summary Judgment dismissing the claims of Plaintiff and Counter-Claim Defendant Priddis Music, Inc. ("Priddis") and sustaining TWEC's Counter-Claim.

Dated: October 2, 2006

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PRELIMINARY STATEMENT

This is a breach of contract claim brought by Priddis against TWEC.[1] Priddis seeks vague and unverifiable damages for purported breaches committed by TWEC over the entire course of their approximately five year relationship. These alleged breaches take the form of (1) returns of product; (2) the charge of a Rack Placement Fee; (3) the supply, by Priddis, of display racks; and (4) excessive credits under the Buy-Out Agreement. These allegations are made despite:

- the existence of a written and executed contract that expressly states that Priddis' product was "100% returnable, no exception (Declaration of Undisputed Material Facts ("Material Facts")) at ¶ 16;
- the fact that Priddis reaffirmed that term as late as July, 2003 (Material Facts at ¶ 19;
- the existence of written and executed contracts wherein Priddis agrees to all Rack Placement Fees (Material Facts at ¶¶ 23, 24);
- the existence of a written and executed contract that expressly states that Priddis would supply display racks at its own cost (Material Facts at ¶ 13); and
- the fact that Priddis admits that it "wrote off" the credits from the Buy Out Agreement at the time they were taken (Material Facts at ¶ 11).

After the dismissal of its overreaching fraud claims, Priddis is left with nothing more than vague and unsupported allegations that fly directly in the face of the clear and unambiguous agreements to which it agreed. Simply put, in order to avoid the lawful results of the agreements that it negotiated and signed, Priddis asks this Court to rewrite its deal with TWEC and impose additional obligations retroactively in order to obtain a windfall. Such a request, however, is inconsistent with black letter law and should be dismissed by this Court.

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[1] Priddis initially brought this action based in large part on claims of fraud. Those claims were dismissed by this Court on August 25, 2005. In addition, as discussed below, Priddis sets forth a quasi-contractual claim (unjust enrichment) which should now be dismissed in light of the clear and unambiguous contracts that exist.

In contrast, Priddis' undisputed actions, specifically its refusal to accept the return of product despite its clear obligation to do so, constitutes a breach of its agreement with TWEC. As such, TWEC respectfully requests that summary judgment be granted in its favor on its breach of contract claim.

STATEMENT OF FACTS

TWEC is a New York corporation that owns and operates some 1,000 retail music stores throughout the United States. See Material Fact at ¶ 1. Priddis is a Nevada corporation that manufactures and markets karaoke music products. Id. at ¶ 2. In 1999, Priddis and TWEC entered into negotiations for a business relationship that would have TWEC distribute the Priddis karaoke music product. Id. at ¶ 6. TWEC explained that its relationship with a previous karaoke supplier, Sound Choice, had ended and that a new supplier was needed. Id. at ¶ 7. Priddis, for its part, was anxious to enter into a relationship with TWEC because of the possibility of increasing sales through TWEC's large retail store network. The relationship between TWEC and Priddis was memorialized in several agreements that encompassed the contractual terms of the parties. Id. at ¶ 8.

The first agreement, entered into on or about May 25, 1999, controlled the initial stage of the relationship. TWEC and Priddis entered into an agreement whereby Priddis agreed to replace TWEC's existing supply of Sound Choice karaoke product with Priddis' own karaoke product. This agreement, drafted by Priddis, was referred to as the Buy Out Agreement. See Exhibit A to the Declaration of Robert Tietjen, dated October 2, 2006 ("Tietjen Dec.");[2] Exhibit B at ¶ 11[3]. Priddis agreed to accept the Sound Choice product even though it was aware that it would have no value to Priddis. See Material Fact at ¶ 10. In addition to the replacement, the terms of the Buy Out Agreement stated that "Priddis product ordered on regular terms may be returned for cash credit." See Exhibit A. Pursuant to the terms of the Buy Out Agreement, Priddis accepted returns from TWEC, and TWEC took a credit for $336,630. Compl. ¶ 13. Although Priddis now alleges that TWEC took excessive credits, Priddis admits that it reconciled its account in TWEC's favor and "wrote off" the difference at the time TWEC took the credit. Id. ¶¶ 14, 15.

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[2] For the purposes of this Memorandum of Law, citations to the Tietjen Dec. will appear as "Exhibit __."

[3] While the Complaint is attached as Exhibit B to the Tietjen Dec., for the purposes of this Memorandum of Law, it will be cited as "Compl."

In addition to the Buy Out Agreement, TWEC and Priddis entered into a written Point of Sale Display Agreement ("Display Agreement") (effective October 1, 1999) which set forth the rights and obligations of the parties regarding the display racks. See Material Fact at ¶ 12. Priddis supplied racks to TWEC for the display of its product. Compl. ¶¶ 16, 18. Pursuant to the Display Agreement, Priddis agreed to supply display racks for TWEC store locations in return for TWEC's "best efforts" in purchasing enough Priddis product to fill those racks. See Exhibit C at ¶ 3. One year after TWEC fulfilled that obligation, ownership of the racks passed to them. Id. at ¶ 4.

Lastly, on or about June 7, 1999, TWEC and Priddis executed a "Vendor Approval Request" form ("Vendor Agreement") which set forth the terms under which TWEC and Priddis agreed to operate. See Material Fact at ¶ 15. Priddis has confirmed that the Vendor Agreement is the contract that primarily governed the parties' relationship. Compl. ¶¶ 26, 133. Under the Vendor Agreement, Priddis explicitly agreed that product from any regular orders placed by TWEC were 100% returnable with no exceptions. See Exhibit D (emphasis added). The Vendor Agreement does not have a durational term and thus could have been terminated with proper notice by Priddis at any time. See id. Priddis expressly reaffirmed the terms of the Vendor Agreement in signed letters. See Material Fact at ¶ 19.

Subsequently, TWEC and Priddis began to conduct business, with Priddis supplying karaoke product for TWEC stores. In connection with the proper exercise of its rights, TWEC regularly returned product to Priddis. See Material Fact at ¶ 20. Despite the present posture, such returns were handled by both parties in the normal course of business. Indeed, many returns were either understood to be predetermined (such as leftover holiday items) or the result of collaboration between the parties. See Material Facts at ¶¶ 21, 22. Also, it was a regular occurrence for TWEC and Priddis personnel to confer about poorly selling product, which would be returned in exchange for other product that was felt to have a better chance for success. Id.

Separate and apart from Priddis' relationship with TWEC, several outside factors contributed to Priddis' financial troubles. The first was the loss of its largest customer, Music Land, when it was acquired by Best Buy. See Material Fact at ¶ 25. According to Priddis, that relationship ended because the new buyer "didn't handle the–obviously the account very well." See Exhibit E at 258:5-11. Additionally, the popularity of karaoke in general was declining. See Material Fact at ¶ 25. Indeed, during the time of its relationship with TWEC, Priddis had approximately 200 open accounts; as of the time of this litigation, Priddis has only three remaining accounts. Id. at 26.

From the beginning of the parties' relationship, Priddis lodged various complaints and concerns. TWEC undertook substantial good faith efforts to address those concerns. For example, Priddis initially was required to ship the product directly to retail stores – literally to hundreds of different locations. In response to concerns expressed by Priddis, however, TWEC revised its system to allow Priddis to begin to ship product through distribution centers as opposed to retail locations. See Material Fact at ¶ 27. This accommodation was of great value and increased ease and efficiency, as Priddis no longer had to ship to or from multiple locations as a regular course. See Exhibit E at 298:1-23 ("Q - What would be the benefit to you? A - Being able to ship in bulk to one location rather than to hundreds of stores. And then the accounting was much easier to deal with").[4]

Despite these efforts, however, in approximately 2003, the relationship between Priddis and TWEC began to break down. Finally, in March, 2004, with no prior notice, Priddis severed its relationship with TWEC by refusing to accept a return of goods. See Material Fact at ¶ 34. Notably, however, immediately prior to that cancellation and while Priddis was actively contemplating bringing a lawsuit, a large order was shipped out to TWEC. See Exhibit F at 235:5-23. The value of that order is included in the Priddis damage calculations. Id. at 237:7-17.

In June 2004, Priddis filed an action for breach of contract in Utah state court. See Material Fact at ¶ 3. That action was subsequently dismissed based on a choice of forum clause in the governing agreement between the parties. See Exhibit G. On April 20, 2005, Priddis filed the instant action. See Material Fact at ¶ 5. The scope of the allegations, however, had grown considerably and, in an effort to avoid the clear effect of its own agreements, Priddis attempted to rely on fraud and misrepresentation claims to bolster its case. On August 25, 2005, this court dismissed the claims of fraud, conversion and implied covenant of good faith and fair dealing. See Exhibit H. As such, Priddis is once again left with claims controlled by the clear and express agreements that it freely entered into.

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[4] TWEC also went to great lengths to satisfy concerns expressed about their standard billing practices. See Material Fact at ¶ 30. To address their own concerns about Priddis double billing, shipping delays and freight charges, the Priddis bills and account were reconciled on several occasions and on a far more regular basis than other vendors. See Material Fact at ¶¶ 28, 29.

ARGUMENT

I. BREACH OF CONTRACT

A. Priddis Cannot Establish a Material Issue of Fact To Prove a Breach of Contract

In order to maintain a breach of contract action, Priddis must be able to offer admissible evidence of (1) a contract; (2) performance of the contract by one party; (3) a breach by the other party; and (4) damages. See Rexnord Holdings, Inc. v. Biderman, 21 F.3d 522, 525 (2d Cir. 1994); Constructive Hands, Inc. v. Baker, 2006 WL 2270376, at *3 (N.D.N.Y. Aug. 8, 2006). Priddis, however, can establish neither a breach of any of the agreements at issue or of damages that can be substantiated by any legitimate rationale.

While the Priddis Complaint contains a laundry list of allegations relating to TWEC's purported actions, the calculation of damages in paragraph 37 along with an examination of the body of the Complaint suggests that Priddis complains of several TWEC actions taken during the course of the relationship: (1) the return of product by TWEC (despite an express contract term allowing such returns); (2) excessive credits under the Buy-Out Agreement (despite the fact that Priddis admits that it "wrote off" those credits at the time they were taken); (3) the Rack Replacement Fees (despite written contracts signed by Priddis agreeing to the fees); and (4) the cost of the Display Racks (despite a written agreement, signed by Priddis, agreeing to supply the racks at no cost to TWEC). Each of these purported claims will be examined in turn.

(1) TWEC Returns of Product were not a Breach of Contract

Priddis alleges that TWEC breached the 1999 Vendor Agreement through "excessive" returns of product.[5] Compl. ¶ 136. That claim, however, ignores not only the clear and unambiguous contract term that grants to TWEC an unrestricted right to return product, but also the ongoing course of conduct of the parties themselves, wherein TWEC continuously returned product throughout the relationship and Priddis accepted such returns. For Priddis now to claim that the routine act of returning product, which took place throughout the life of the contractual relationship and was expressly allowed by the written agreement, constituted a breach of contract, is disingenuous at best.

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[5] However, for the purposes of this litigation, Priddis has defined "excessive" to include "any and all returns" made by TWEC. When questioned about the calculation of damages for returns in the Plaintiff's Rule 26

As detailed above, the 1999 Vendor Agreement described the Priddis karaoke product as "100% Returnable - No Exceptions." See Exhibit D. Priddis not only agreed to this clear term in 1999, but subsequently expressly reaffirmed that term. See Material Fact at ¶ 19. Simply put, it cannot be a breach of contract for TWEC to take an action that the contract itself expressly and unambiguously allowed.

In the case at hand, the terms could not be more straightforward: TWEC and Priddis agreed that the product was "100% Returnable - No Exceptions." See Exhibit D. In other words, TWEC was permitted under the Vendor Agreement to return as much product as it chose, at any time it chose. See Material Fact at ¶ 21. Indeed, Priddis expressly admitted this fact in its deposition when discussing the terms of the 1999 Vendor Agreement.

Q. [discussing the terms of the 1999 Vendor Agreement] And it says "100 percent returnables [sic], no exception," open paren "regular orders," close paren. Then "50 percent returnables" scratched out. Do you see that?

A. Yes.

Q. Did you fill that out?

A. Yes.

Q. What was your understanding of that term when you filled it out?

Supplemental Disclosure, Priddis employee Alaina Price testified that Rick Priddis has instructed her to include all returns. See Exhibit F at 149:15-150:11.

A. They were able to return 100 percent of the product ...

Q. Okay

A. - on regular orders, which meant other than swap deals or special deals.

See Exhibit I at 194:14-195:4 (emphasis added).

Clearly, then, Priddis was aware of the plain meaning of the terms from the very beginning of the relationship, and that understanding did not change. Throughout the relationship, Priddis remained aware of the meaning and import of that term and expressly reaffirmed it in 2003. See Exhibit J. In its deposition, Priddis expressly admitted that the company had once again agreed that Priddis product was "100% returnable."

Q. Going down to the 100 percent returnable for credit, and there's a Y.

A. Yes.

Q. Does that indicate yes –

A. Yes.

Q. –that you agreed to that term?

A. Yes.

Q. Okay. And that was the same as the 1999 vendor agreement, that term?

A. Yes.

See Exhibit I at 205:3-205:13.

It is simply inconceivable, in light of Priddis' repeated recognition of the clear and unambiguous meaning of the return provision, how it can now allege that TWEC's returns constitute a breach of the Vendor Agreement.

To avoid the clear meaning and consequences of the negotiated contract term, Priddis desperately attempts to graft new restrictions into the agreement. The Priddis Complaint states that TWEC's returns were "far in excess of what is standard in the retail music industry (Compl. ¶39), and that "[u]nder normal business practices" retailers did not act in that manner (Compl. ¶40). The practices of other music retailers, however, are simply not relevant to the issue at hand. Where, as here, the terms of an agreement are clear and unambiguous, courts will not consider parol evidence to determine breach. Feifer v. Prudential Ins. Co. of America, 306 F.3d 1202, 1210 (2d Cir. 2002) ("It is axiomatic that where the language of a contract is unambiguous, the parties intent is determined within the four corners of the contract without reference to external evidence").

When faced with a written contract, the objective of a trial court is to give effect to the intent of the parties, as revealed in the terms of the agreement. See Seiden Assoc. Inc. v. ANC Holdings, Inc., 959 F.2d 425, 428 (2d Cir. 1992). Where the language of a contract has a "definite and precise" meaning, summary judgment is appropriate. Id. Further, contract terms are not made ambiguous simply because a party urges a different interpretation. See Seiden, 959 F.2d at 428; Bethlehem Steel Co. v. Turner Constr. Co., 2 N.Y.2d 456 (1957) (no ambiguity where interpretation "strain[s] the contract language beyond its reasonable and ordinary meaning). Instead, it is well settled that a party may not introduce extrinsic evidence to determine the meaning of a contract that is unambiguous. See Omni Quartz, Ltd. v. CVS Corp., 287 F.3d 61, 64 (2d Cir. 2002).

Specifically, Priddis' citation to the "standard in the retail music industry" and "normal business practices" (Compl. ¶¶ 39, 40), does not serve to create an ambiguity or create an issue of fact. It is well settled that New York law, that "evidence of industry practice may not be used to vary the terms of a contract that clearly sets forth the rights and obligations of the parties." Croce v. Kurnit, 737 F.2d 229, 238 (2d Cir.1984); *accord* Bellefonte Re Ins. Co. v. Argonaut Ins.

Co., 757 F.2d 523, 528 (2d Cir. 1985); see Milonas v. Pub. Employment Relations Bd., 648 N.Y.S. 2d 779, 785 (3d Dep't 1996); see also A.I. Credit Corp. v. Gov. of Jamaica, 666 F. Supp. 629, 632 (S.D.N.Y. 1987). Here, the Vendor Agreement clearly expresses that TWEC had the right to return product to Priddis, "100% - no exceptions." As noted above, Priddis itself admitted that right and its understanding of that right upon entering the agreement. See Exhibit I at 194:14-195:4. Simply put, that provision unambiguously means exactly what it says – that TWEC had an unrestricted right to return product, "no exceptions."

Indeed, to interpret the right of return in any other way would render the term meaningless. Further, such an interpretation would run directly counter to established contract interpretation rules. It is black letter law that contracts are to be interpreted in a way that gives all terms and provisions meaning and validity. See Josephson v. Empire Blue Cross & Blue Shield, 2005 WL 2413638, at 3 (E.D.N.Y. Sept. 28, 2005) (citing Summer Communications, Inc. v. Three A's Holding, LLC, 1999 WL 106216 (2d Cir. Feb. 26, 1999) (finding that a contract allowing for "100% return privileges" was clear and unambiguous and further noting that, even were it to examine outside evidence, such a provision was consistent with industry practice in the retail music business); Hudson v. IRS, 2004 WL 1006266, at *7 (N.D.N.Y. Mar. 25, 2004) ("A contract should be construed to give meaning to every word or phrase contained in it"). To qualify TWEC's return rights, as Priddis urges, would completely destroy the plain meaning of the term and deprive TWEC of a negotiated contract right.

In addition, even if this Court somehow were to find ambiguity in the "100% returnable no exceptions" contract term, TWEC's right to return product is established conclusively through the course of conduct of both parties throughout the duration of the agreement. From the beginning of their relationship, as was its right, TWEC returned product to Priddis. And from the beginning of the relationship, Priddis accepted those returns. Indeed, the return of Priddis product was an issue that was routinely discussed between the parties and, often, jointly agreed upon. See Material Fact at ¶ 22. Such interpretation of a contract provision through practice and course of conduct is considered compelling evidence of the actual intent of the parties. See IBJ Schroder Bank & Trust Co. v. Resolution Trust Co., 26 F.3d 370, 374 (2d Cir. 1994) ("There is no surer way to find out what parties meant, than to see what they have done"); Ocean Transp. Line, Inc. v. Am. Philippine Fiber Indus., Inc., 743 F.2d 85, 91 (2d Cir. 1984) ("The parties' interpretation of the contract in practice, prior to litigation, is compelling evidence of the parties' intent").

Thus, based on the clear and unambiguous contract language expressly allowing TWEC to return product, as well as the fact that Priddis both admitted that right and acted at all times in accordance with that right, TWEC should be granted summary judgment on the issue.

(2) Priddis Agreed to TWEC's Credits Under the Buy-Out Agreement

As described above, in May 1999, Priddis and TWEC entered into a Buy Out Agreement, whereby Priddis agreed to essentially swap TWEC's existing stock of Sound Choice product for Priddis product. See Material Fact at ¶ 9. In its Complaint, Priddis alleges that TWEC took excessive credits under the Buy Out Agreement. See Compl. ¶ 13. However, Priddis goes on to admit that it then wrote off that difference after discussions with TWEC. See Compl. ¶ 15. While the Complaint states that "it is Priddis' position that TWEC still owes Priddis this amount under the terms of the Buy Out Agreement," it does not explain under what theory that might be so. Regardless of the theory, Priddis now seeks to elevate a routine reconciliation between parties to an agreement into a breach of contract. Priddis cannot now, some five years after the alleged actions, suddenly claim a breach and reasonably expect to recover. See Suzhou Textiles

Import & Export Corp. v. Swell Fashions, Inc., 1996 WL 586348, at *1 (S.D.N.Y. Oct. 11, 1996) ("Waiver is an intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it"). Indeed, no factual dispute exists on the issue. As stated in the Complaint itself, Priddis was aware of what it claims to be the difference in accounts and deliberately made the decision at the time to agree to TWEC's position. Compl. ¶¶ 14, 15. That decision constituted a waiver of any claim for the disputed amount and effectively bars their present claim.

(3) Priddis Agreed to the Rack Placement Fees

In or around November 2000, TWEC administered a Rack Placement Fee in connection with the placement of Priddis product in TWEC retail stores. See Material Fact at ¶ 23. This fee was administered to all similarly situated vendors. In 2000, and in subsequent years, Priddis expressly agreed to these fees. Id. at ¶ 24. These agreements, which are clear and unambiguous, simply called for the payment of a certain fee in return for the placement of display racks. Id. Moreover, these agreements have been fulfilled by both parties. Priddis seeks a return of the payments made during and pursuant to the ordinary course of the relationship.

In its Complaint, Priddis asserts that the administration of this fee was somehow improper and that it is entitled to the return of those amounts. See Compl. ¶¶ 91-98. Specifically, Priddis claims that the agreements, executed by them on three separate occasions over the course of three years, were procured through economic duress. Compl. ¶ 96. Priddis is wrong.

To establish economic duress in New York, a party must establish (1) a threat; (2) which was unlawfully made; (3) that caused the involuntary acceptance of contract terms; (4) because no other alternative was available. See Teachers Ins. & Annuity Ass'n. of Am. v. Wometco

Enters., Inc., 833 F. Supp. 344, 347-48 (S.D.N.Y. 1993); Nelson v. Stanley Blacker, Inc., 713 F. Supp. 107, 110 (S.D.N.Y. 1989). Importantly, however, the threat made must be "wrongful." See Knoll v. Equinox Fitness Clubs, 2003 WL 23018807, at *8 (S.D.N.Y. Dec. 22, 2003) ("Without a wrongful threat by [defendant] [plaintiff's] economic duress argument fails as a matter of law and must be dismissed"). "Threats" by a party to act in a legal fashion do not constitute economic duress. See Teachers Ins. & Annuity Assoc. of America, 833 F. Supp at 348 ("Threats by a party to act in accordance with its legal rights do not and cannot constitute duress"). Here, the only allegation made by Priddis, even interpreting all inferences in its favor, is that TWEC informed Priddis that all vendors were required to agree to the fee. As the Vendor Agreement contained no durational term, both Priddis and TWEC were free to cancel the agreement at any time. See Exhibit D. Thus, TWEC had a legal right to seek other vendors for any reason, and the exercise of that right does not constitute economic duress.

Ignoring the provision in the Vendor Agreement providing for fees such as the rack placement fee upon approval, Priddis seems to imply that the Rack Placement Fee was somehow imposed against the terms of that agreement. See Compl. ¶ 91-93. Even accepting that strained position, however, does not salvage the Priddis position. It is well settled that a threatened breach of contract does not constitute economic duress where legal remedies were available to the threatened party. See Nelson, 713 F. Supp. at 110 ("Under New York law, a party may not prevail on an economic duress claim unless the party demonstrates that a breach of contract action would have been impossible when the threat was made"). To the extent that it is determined that TWEC's actions did somehow constitute a breach of the Vendor Agreement, Priddis had as an option a breach of contract action and, thus, may not now rely on an economic duress defense to the formation of the agreements.

Finally, the fact that Priddis waited until this action to claim economic duress, some five years after the first purported instance in 2000, is fatal to the claim. Under New York law, a contract executed under duress "is not void but merely voidable." Nelson, 713 F. Supp. at 110; Knoll, 2003 WL 23018807, at *7. By accepting benefits under a contract, acquiescing in the contract or affirmatively acknowledging the contract, a party ratifies the agreement and waives any claim for economic duress. See Knoll, 2003 WL 23018807, at *7 ("If the ... party does not promptly repudiate the contract or release, he will be deemed to have ratified it"). In other words, in order to preserve a claim of economic duress, a party "must act promptly lest he be deemed to have elected to affirm it." Benefit Concepts N.Y., Inc. v. Benefit Concepts Sys., Inc., 1995 WL 133773, at *4 (S.D.N.Y. Mar. 28, 1995). Here, Priddis did not act to repudiate the Rack Placement Fee agreements, but, instead, affirmatively acknowledged those agreements both by paying the required fees and by accepting the benefit of improved rack locations within TWEC stores. At no point before the institution of this action did Priddis ever raise the allegation of economic duress. Thus, even assuming, *arguendo*, that the agreements were executed under duress (which they were not), Priddis' subsequent ratification bars assertion of that defense as a matter of law.

(4) Priddis Agreed to Absorb the Cost of the Display Racks

Lastly, Priddis seeks damages for its cost of supplying display racks to TWEC. See Compl. ¶¶18-23. However, like Priddis' other alleged breaches, this claim fails as a result of a clear written agreement. In October, 1999 Priddis and TWEC entered into the Display Agreement. See Material Fact at ¶ 12. That agreement stated clearly and unambiguously that Priddis would supply to TWEC racks for the display of product. See Exhibit C. Under the agreement, TWEC was required to "continue its best efforts in purchasing and selling Vendor product until enough product has been purchased to fill all Displays shipped by Vendor to Buyer." Id. at ¶ 3. Ownership of the racks would then pass to TWEC after one year. Id. at ¶ 4. Priddis does not dispute that TWEC filled the racks with sufficient product. Instead, in an effort to avoid the clear effect of the agreement, Priddis now seeks a retroactive judicial modification that would impose new obligations on the parties. See Compl. ¶ 22 ("TWEC never ordered **and paid for** enough product to fill the display racks") (emphasis in original). This position is wrong both legally and factually.

First, the language of the Display Agreement is undisputed. Nowhere in that agreement is there any language even close to the addition urged by Priddis. TWEC was required to "purchase" Priddis product and it did, paying for that product as it went. See Material Fact at ¶ 31. What Priddis objects to, of course, is the fact that after product was purchased, it was also sometimes returned by TWEC. However, the issue of purchases and returns are entirely separate and what Priddis actually urges in this action is an interpretation of the Display Agreement that would eviscerate TWEC's unqualified right to return product under the Vendor Agreement. Indeed, Priddis admits that its strained interpretation of that provision was never discussed with anyone at TWEC. See Exhibit I at 173:21-174:13 ("Q - Was it ever discussed with anyone at Trans World .... that a purchased item would not include an item that was subsequently returned. A - I never discussed it in that way, no").[6] Thus, Priddis cannot now recharacterize TWEC's obligation in order to wrongfully recoup its negotiated expense.

Second, even accepting Priddis' *post hoc* additions to the Display Agreement, the argument is factually wrong. Priddis admits that, over the life of the relationship with TWEC, over $3 million dollars was paid for Priddis product. See Material Fact at ¶ 32. That amount of product was more than sufficient to fill the display racks. Indeed, there are no allegations that the racks were empty at any time – only that TWEC returned product and thus received credits therefore. Thus, even according to the undisputed factual allegations made by Priddis itself, no material issue of fact exists with regard to the issue of whether TWEC fulfilled its obligations under the Display Agreement.

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[6] Notably, Priddis' own documents, produced during discovery, agree with this conclusion. See Exhibit I at 173:2-20.

B. Priddis Cannot Prove Damages with Reasonable Certainty

In its Complaint, Priddis does not specify what type of contract damages it seeks. Regardless of the type of calculation, however, it is axiomatic that in order to establish a breach of contract claim, Priddis must prove its damages with "reasonable certainty." See Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc., 341 F. Supp. 2d 258, 271 (S.D.N.Y. 2004) ("[P]laintiff must *prove* any claimed damages that were caused by Defendant's breach to a reasonable degree of certainty"); RESTATEMENT (SECOND) OF CONTRACTS § 352 (2006), ("Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty"). In this regard, Priddis has failed.

In its Complaint, Priddis claims damages of $3,125,000. However, the undisputed testimony by Priddis' own employee establishes that the calculation used to achieve that number is fatally flawed and thus insufficient to provide a "reasonable certainty" of accuracy.

In paragraph 37 of the Complaint, Priddis offers a breakdown of its damage calculation. In addition to amounts that Priddis expressly agreed to in writing (such as the advertising fees, cost of display racks and credits taken under the Buy Out Agreement) or that Priddis itself has caused (i.e., almost $186,000 in returns that Priddis has refused to accept[7]), the bulk of the

7 See Exhibit F at 151:15-153:2; 153:9-155:3.

calculation ($1,592,920) relates to returns of Priddis product that were purportedly "disallowed as excessive and unreasonable." Compl. ¶ 37.[8]

In calculating this amount, however, Priddis simply tallied the dollar amount of each and every return made by TWEC over the life of their relationship.

Q How did [Rick Priddis] assist you?

A. He defined excessive and unreasonable returns.

***

Q. Okay. And how did he define that?

A. Any and all returns.

Q. So, that number, $1,592,920.17, as represented in Price Exhibit 1, is simply a total of all the returns made by Trans World throughout the course of their relationship with Priddis. Is that correct?

A. True.

See Exhibit F at 149:18-150:11.

The purported calculation of "damage" related to TWEC returns, then, includes *all* returns, including those (1) that were agreed to by the parties; (2) that were the result of discontinued product; (3) that were the result of post-holiday restocking; (4) that were the result of store closings; or (5) that were the result of any number of other reasons. See Material Fact ¶ 21. Indeed, in his deposition, the president of Priddis testified that TWEC did not breach the Vendor Agreement each and every time it returned a product.

Q. Okay. Let me ask you this: Is it your position that every time Trans World returned product, that was a breach of the agreement?

A. No.

See Exhibit I at 137:1-4.

[8] This same calculation was submitted in Priddis' Supplemental Disclosure under Federal Rule 26(a)(1). See Exhibit GG.

Thus, according to the testimony of Priddis itself, the damages for "excessive" returns, which included all returns, encompasses at least some returns that were legitimate. In fact, Priddis testified that it was not until the fourth quarter of 2001 that the TWEC returns were perceived to be a problem. See Exhibit I at 238:4-21.[9]

In addition, to including in its calculation actions that Priddis admits were not breaches, the claim for damages is also grossly inflated because of the simplistic way it was calculated. Uncontroverted testimony by Priddis' own employee establishes that in many cases product that was returned to Priddis was simply sent back to TWEC in a future order. When questioned about whether the same items are ever shipped back to TWEC, Ms. Price testified clearly that they were.

> A. From this spreadsheet- only thing I could determine would be something that had quite a bit returned and then was reordered by Trans World the next quarter, those are most likely sent back out to Trans World. We could not turn around their large returns very quickly at all mostly because they were so massive; and so, if they reordered it, such as the - [Ms. Price refers to a specific column]
> ****
> ...they returned 2,083 product. They turned around and ordered 525 of it the first quarter of '02. Those were most likely all from that 2,083 product that was returned the quarter before.
>
> Q. Okay. So, in other words, Priddis wasn't creating new product, they were recycling the product that would come in and just give the same product back out?
>
> A. Correct.

See Exhibit F at 117:2-20.

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9 This testimony came during a line of questioning designed merely to ascertain what actions by TWEC were alleged to have been contract breaches (i.e., what returns were "excessive" and in breach of the Vendor Agreement). Priddis was unable to provide an answer to that basic question and, following the testimony regarding the late 2001 timeframe, attempted to qualify the answer to allege that prior to that date, while TWEC's actions were not a breach, it was acting according to a "plan" to build up inventory in preparation for a later breach. See Exhibit I at 139:1-143:10. Regardless of the Priddis position, however, and putting aside the fact that there were no breaches in the face of TWEC's absolute right to return product, the Priddis testimony establishes that no returns prior to the end of 2001 should be used to calculate damages.

Priddis would also sell returned product to other customers. See Exhibit F at 112:4-113:2 ("It could go to a different customer").

In other words, the same specific CD may have been returned to Priddis and subsequently shipped back to TWEC on multiple occasions. That CD has but a single value, yet Priddis is now attempting to collect multiple damages based on that single item. Thus, Priddis is seeking to collect multiple numerical "prices" for single items as well as "damages" for items that were actually sold to other customers. In fact, Priddis is not able to determine which of the purported returns were reshipped to TWEC and which, if any, ultimately remained with Priddis.

Q. Mr. Priddis, I'd like to talk for a few minutes about the product that Trans World returned to you. What have you done with it over the years?

A. It goes back into our warehouse. And if we can, we sell it. Some doesn't sell just because of the volume, the large volume. You know, we have smaller accounts. Trans World was, by far, our largest account next to Music Land. And so, the volume of product they were buying, it's difficult to move that again. So, a lot of it sits in the warehouse.

Q. Do you have any sense of is it 50 percent of it or 90 percent?

A. I don't know.

****

Q. And you've never made any attempt to endeavor to determine what that number is?

A. Not specifically for what you're asking, no.

See Exhibit E at 319:1-320:4.[10]

As such, Priddis does not and cannot establish its damages with any degree of "reasonable" certainty.

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[10] During the course of discovery, TWEC repeatedly requested greater specificity from Priddis regarding its answers to interrogatories on questions relating to Priddis' damages. And TWEC filed a motion to compel seeking more complete answers. The Magistrate concluded that TWEC could obtain the requested information during Mr. Priddis' deposition. As demonstrated herein, Mr. Priddis could not provide any degree of specificity and repeatedly contradicted the allegations in the complaint which suggest that all of the returns of product were "unauthorized".

II. PRIDDIS' REMAINING CAUSES OF ACTION FAIL AS A MATTER OF LAW

Priddis' remaining causes of action, for the price of goods sold under UCC § 2-709 (Compl. ¶¶ 145-150) and unjust enrichment (Compl. ¶¶ 151-155) fail as a matter of law because of the existence of written agreements that address and control the subject matter of the allegations. As discussed below, each of these causes exist only in the absence of an applicable written agreement.

A. The Priddis Claim Under UCC § 2-709 Fails as a Matter of Law

Priddis' claim under Uniform Commercial Code ("UCC") § 2-709 is likewise unavailing. UCC § 2-709 addresses the return of goods and allows a selling party to recover the price of accepted goods where the buyer has failed "to pay the price as it becomes due." UCC § 2-709 (2005). In relation to this cause of action, Priddis alleges in its Complaint that "TWEC accepted these goods and/or did not properly reject the goods and, therefore, accepted them." Compl. ¶ 148. This allegation, and the entire claim, however, once again ignores the undisputed fact that there exists a written and executed contract that directly controls this exact issue. As discussed above, the Vendor Agreement gives TWEC an express and unrestrained right to return Priddis product. Thus, the question of whether TWEC "accepted and/or did not properly reject" the Priddis product, such as to implicate § 2-709, is not relevant to the analysis because TWEC's actions do not involve "acceptance" of the goods and were expressly allowed under the Vendor Agreement.

The UCC recognizes the rights of parties to negotiate and contract for specific terms and conditions. In fact, the "freedom to contract" is an idea that is explicitly written into the Code. See UCC § 1-102(3) ("The effect of provisions of this Act may be varied by agreement...."); UCC § 1-102(4) ("The presence in certain provisions of this Act of the words "unless otherwise agreed" or words of similar import *does not imply that the effect of other provisions may not be varied by agreement...*") (emphasis added); see also § 1-102 cmt. 2 (noting the freedom of contract that exists within the UCC). Thus, unless the applicable UCC provision specifically prohibits variation, "the agreement of the parties will trump the provisions of the UCC." Regatos v. N. Fork Bank, 257 F. Supp. 2d 632, 640 (S.D.N.Y. 2003). In this case, of course, that is exactly what has happened. By negotiating and entering into the Vendor Agreement, which allows for 100% returns of Priddis product, both Priddis and TWEC agreed that TWEC's ability to return goods would be controlled by contract, as opposed to any outside provision. The language of UCC § 2-709 is in direct contrast to that provision. Indeed, to apply UCC § 2-709 would be to rewrite the Vendor Agreement, as TWEC would then be precluded from returning *any* product after it had "accepted" it. That was simply not the intent of either party in entering into the Vendor Agreement. See Material Fact at ¶ 17.

Even aside from the fact that the Vendor Agreement undeniably controls the issue, Priddis is unable to satisfy the elements of UCC § 2-709. Priddis has come forth with no evidence of any actual damages it claims to have suffered. As discussed above, Priddis does not and cannot prove with any degree of certainty the damages it suffered as a result of TWEC's alleged contract breach. Because the UCC claim is premised on the exact same factual allegations, the same deficiency exists with respect to that claim as well. Specifically, Priddis cannot establish "the goods identified to the contract," i.e., which product TWEC has "accepted" and not returned. As described above, Priddis' own testimony clearly establishes that it is unable to track specific items and calculated its "damages" for returns by simply adding up all returns despite the fact that in many cases the product was subsequently sold back to TWEC (possibly several times). Moreover, while Priddis claims that the returns were somehow "excessive," the record is clear that TWEC paid for any product that it kept. See Material Fact at ¶ 31. Thus, for purposes of UCC § 2-709, Priddis is unable to establish that TWEC "accepted" any product that was not paid for and, accordingly, the action must fail.

Finally, UCC § 2-709 requires that a seller "hold for the buyer any goods which have been identified to the contract and are in his control..." Priddis has put forth no evidence that it continues to have in its possession the goods that were allegedly improperly rejected. See Exhibit E at 319:1-320:4. Without evidence of such goods, Priddis may not prevail under UCC § 2-709.

B. Priddis' Unjust Enrichment Claim is Duplicative and Should be Dismissed as a Matter of Law

The Priddis claim for unjust enrichment should also be dismissed. In connection with the motion to dismiss filed previously in this action, this Court declined to dismiss the claim for unjust enrichment. Now, after extensive document and testimonial discovery, Priddis is in no better position to establish that TWEC was in any way, unjustly enriched at its expense. Nor is there a material fact in dispute with regard to any actions or performance by Priddis somehow extending beyond the contours of the applicable written agreements. As such, as argued in the previous motion to dismiss, the Priddis claim for unjust enrichment must fail.

In order to recover under an unjust enrichment theory, Priddis is required to establish that (1) TWEC was enriched; (2) that enrichment was at Priddis' expense; and (3) TWEC's retention of the benefit would be unjust. See New Paradigm Software Corp. v. New Era of Networks, Inc., 107 F. Supp. 2d 325, 328-29 (S.D.N.Y. 2000); Gidatex v. Campaneillo Imports, Ltd., 49 F. Supp. 2d 298, 301 (S.D.N.Y. 1999). Because unjust enrichment is a quasi-contractual remedy, however, "it is only available when no express contractual obligation exists." Gidatex, 49 F. Supp. 2d at 301. It is well settled that where a valid contract does exist, a party may not seek recovery under this quasi-contract theory. See New Paradigm, 107 F. Supp. 2d at 329 ("Because both parties agree that a valid and enforceable contract exists between them, Plaintiff may not plead the quasi-contractual theory of unjust enrichment"); Seiden Assoc. v. ANC Holdings, Inc., 754 F. Supp. 37, 40 (S.D.N.Y. 1991) ("To the extent that there is a valid and enforceable contract... plaintiff will not be able to seek recovery in quasi contract in addition to or in conflict with the express terms of that contract").

Here, it is undisputed that valid and enforceable agreements exist that clearly encompass the issues raised by Priddis. Indeed, Priddis has cited to those contracts in its Complaint and admitted their existence, validity and application to the allegations raised. See Compl. ¶ 11 (admitting the existence of the Buy Out Agreement); ¶ 18 (admitting the existence of the Display Agreement); ¶ 26 (admitting to the existence of the Vendor Agreement); ¶¶ 96, 97 (admitting to the existence of the Rack Placement Fee agreements). In the face of these actual contracts, Priddis' quasi contractual claim for unjust enrichment must fail.

In its papers for the motion to dismiss, Priddis argued that dismissal of its unjust enrichment claim was unwarranted because (1) there remained a dispute as to the "scope" of the parties' obligations under the Vendor Agreement; and (2) the validity of the agreements was in dispute because of fraudulent inducement. See Priddis Memorandum of Law in Opposition to Defendant's Motion to Partially Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) ("Priddis Memo") at 20. In the procedural context of a motion to dismiss, based solely on the allegations made, this Court allowed Priddis the opportunity to attempt to muster evidence to support its claim. Even now, however, over a year later and after extensive discovery, no material fact remains in dispute with regard to either of these issues, and thus Priddis is unable to salvage its claim.

First, with regard to Priddis' claim that the applicable agreements were induced through fraud, that issue has been mooted by this Court's dismissal of the Priddis fraud claims. Thus, no issue remains as to the legal validity of the several agreements at issue. As those agreements clearly control the issues in dispute in this action, their existence makes an unjust enrichment claim redundant. See ESI, Inc. v. Coastal Power Prod. Co., 995 F. Supp. 419, 437 (S.D.N.Y. 1998) (finding that unjust enrichment and constructive trust apply only in absence of valid and enforceable contract).

Second, the survival of the claim in the previous motion to dismiss was based on the procedural context and the theoretical possibility that there was some actual dispute with regard to obligations under the Vendor Agreement. Now, however, after the collection of documents and the taking of testimony, it is clear that there can be no legitimate debate. The terms of the Vendor Agreement are clear and unambiguous and allow TWEC to return product "100%, no exceptions." See Exhibit D.[11] This fact was admitted by Priddis itself. That Priddis was not happy with the terms it expressly agreed to cannot be the basis for a claim that the obligation was in dispute. Indeed, the undisputed evidence has established that no material issue of fact exists with regard to a legitimate dispute about either the existence, validity or scope of the applicable agreements. As such, the Priddis claim for unjust enrichment should be dismissed.

III. TWEC IS ENTITLED TO SUMMARY JUDGMENT ON ITS CLAIM FOR BREACH OF CONTRACT

For essentially the same reasons as discussed above, TWEC's counter-claim for breach of contract should be granted. TWEC alleges that Priddis breached the terms of the Vendor Agreement by severing the contractual relationship without notice and refusing to accept returns.

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11 Priddis' citations to other purported "disputes" in their motion to dismiss papers are red herrings that were sufficient when bare allegations were enough to survive but patently insufficient here. There is simply no evidence of any dispute between the parties regarding restocking fees or "certain paperwork." Priddis Memo at 19.

There is no outstanding issue of fact with regard to the terms of the Vendor Agreement; it is clear that the Priddis product was "100% returnable, no exceptions." See Exhibit D. There is also no material issue of fact with regard to what took place: TWEC attempted to return Priddis product in accordance with its contract rights, and Priddis refused to accept those returns. See Material Fact at ¶ 34. Priddis has subsequently refused to accept any TWEC returns. Id. Indeed, Priddis itself admits these facts in its Complaint. See Compl. ¶ 116. Priddis refused to accept those returns in direct contravention of the clear and unambiguous terms of the Vendor Agreement which, as noted on numerous occasions, allows for 100% returns. As a result of that breach, TWEC has sustained damages and has attempted to mitigate its damages by selling some product at a loss.

Thus, because there exists no material issue of fact that (1) a valid and enforceable agreement exists (Material Fact ¶ 15); (2) Priddis breached the terms of that agreement by refusing to accept returns despite its clear obligation to do so (Material Fact at ¶ 34); and (3) TWEC has suffered damages as a result of the Priddis breach, TWEC respectfully urges this Court to grant TWEC's motion for summary judgment on its claim for breach of contract against Priddis.

CONCLUSION

Based on the foregoing, TWEC's motion to for summary judgment should be granted and Priddis' causes of action for breach of contract, unjust enrichment, and UCC § 2-709 should be dismissed. Additionally, summary judgment in favor of TWEC's breach of contract claim should be granted.

Dated: October 2, 2006

Respectfully submitted,

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